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No. 98-529

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In The

# Supreme Court of the United States

October Term, 1998

COLLEEN V. FORD,

*Petitioner,*

*vs.*

SCHERING-PLOUGH CORPORATION; SCHERING CORPORATION; METROPOLITAN LIFE INSURANCE COMPANY,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit*

## BRIEF IN OPPOSITION FOR RESPONDENTS SCHERING-PLOUGH CORPORATION AND SCHERING CORPORATION


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## STATEMENT PURSUANT TO RULE 29.6

Respondent Schering-Plough Corporation is the parent corporation of Respondent Schering Corporation; Respondent Schering Corporation is a wholly-owned subsidiary of Respondent Schering-Plough Corporation.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Statement Pursuant to Rule 29.6 | i |
| Table of Contents | ii |
| Table of Cited Authorities | iii |
| Introduction | 1 |
| Reasons for Denying the Writ | 1 |
| I. Disparity In Insurance Benefits Between Mental And Physical Disability Does Not Violate The ADA. | 1 |
| II. *Carparts* Is An Anomaly In ADA Jurisprudence. | 6 |
| III. Petitioner Is Not A Qualified Individual With A Disability And Cannot Maintain An Action Under Title I Of The Americans With Disabilities Act. | 7 |
| IV. The EEOC And Department Of Justice Interpretations Of The ADA Are Incorrect. | 10 |
| Conclusion | 12 |

## TABLE OF CITED AUTORITIES

*Page*

**Cases:**

*Alexander v. Choate*, 469 U.S. 287, 105 S. Ct. 712 (1985) ..... 4

*Anderson v. Gus Mayer Boston Store*, 924 F. Supp. 763 (E.D. Tex. 1996) ..... 8

*Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 106 S. Ct. 681 (1986) ..... 10

*Brennen v. Comptroller of the State of New York*, 100 F.3d 942, 1996 WL 19057 (2d Cir. 1996) ..... 4

*Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994) ..... 6, 7

*Doe v. Colautti*, 592 F.2d 704 (3rd Cir. 1979) ..... 4

*Elitt v. U.S.A. Hockey*, 922 F. Supp. 217 (E.D. Mo. 1996) ..... 7

*Equal Employment Opportunity Comm'n v. CNA Ins. Co.*, 96 F.3d 1039 (7th Cir. 1996) ..... 3, 9, 10

*Gonzales v. Garner Food Services, Inc.*, 89 F.3d 1523 (11th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 1822 (1997) ..... 10

*Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674 (8th Cir. 1996) ..... 4

*Table of Cited Authorities*


*Page*

*Lenox v. Healthwise of Kentucky, Ltd.*, 149 F.3d 453 (6th Cir. 1998) ..... 3

*Leonard F. v. Israel Discount Bank*, No. 95-6964, 1997 U.S. Dist. LEXIS 9342 (S.D.N.Y. 1997) ..... 7

*Menkowitz v. Pottstown Memorial Med. Ctr.*, No. 97-2041, 1998 U.S. App. LEXIS 20720 (3rd Cir. 1998) ..... 6

*Modderno v. King*, 82 F.3d 1059 (D.C. Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 772 (1997) ..... 4

*Pappas v. Bethesda Hosp. Ass'n*, 861 F. Supp. 616 (S.D. Ohio 1994) ..... 7

*Parker v. Metropolitan Insurance Company*, 121 F.3d 1006 (6th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 871 (1998) ..... 1, 3, 5, 6

*Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 109 S. Ct. 2854 (1989) ..... 11

*Reves v. Ernst & Young*, 507 U.S. 170, 113 S. Ct. 1163 (1993) ..... 10

*Robinson v. Shell Oil Co.*, 519 U.S. 337, 117 S. Ct. 843 (1997) ..... 9

*Sandison v. Michigan High School Athletic Ass'n*, 64 F.3d 1026 (6th Cir. 1995) ..... 6, 7

*Table of Cited Authorities*


| | Page |
|---|---|
| *Smith v. United States*, 508 U.S. 223, 113 S. Ct. 2050 (1993). | 8, 9 |
| *Stoutenborough v. National Football League, Inc.*, 59 F.3d 580 (6th Cir. 1995), *cert. denied*, 516 U.S. 1028, 116 S. Ct. 674 (1995) | 6 |
| *Torres v. National Precision Blanking*, 943 F. Supp. 952 (N.D. Ill. 1996) | 10, 11 |
| *Traynor v. Turnage*, 485 U.S. 535, 108 S. Ct. 1372 (1988) | 4 |
| *Vande Zande v. Wisconsin Dept. of Admin.*, 44 F.3d 538 (7th Cir. 1995) | 5 |
| **Statutes:** | |
| 42 U.S.C. § 300gg-5 | 5 |
| 42 U.S.C. § 12101(b)(1) | 2 |
| 42 U.S.C. § 12101(b)(4) | 2 |
| 42 U.S.C. § 12111(8) | 8 |
| 42 U.S.C. § 12112(a) | 2, 8 |
| 42 U.S.C. § 12181(7) | 6 |
| 42 U.S.C. § 12182(b)(1)(A)(i) | 2 |

*Table of Cited Authorities*


| | *Page* |
|---|---|
| 42 U.S.C. § 12186(b) | 11 |
| 41 U.S.C. § 12206(a)(1) | 11 |
| **Other Authorities:** | |
| 28 C.F.R. pt. 36, app. B, at 640 (1997) | 11 |
| H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2 at 55 (1990) | 8 |
| S. Rep. No. 101-116 (1989) | 5 |

## INTRODUCTION

This Court has limited resources in which to review thousands of petitions, and many clamoring voices urging the importance of each issue. Just months ago, this Court was presented with a petition asking for review of the precise issues raised in this case, involving identical respondents and the same long-term disability policy. *Parker v. Metropolitan Insurance Company*, 121 F.3d 1006 (6th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 871 (1998). Now the Third Circuit has reached the same conclusions concerning the Americans with Disabilities Act as did the *Parker* court. *Ford v. Schering-Plough Corporation*, 145 F.3d 601 (3rd Cir. 1998). This Court should deny certiorari in this case just as it did in *Parker*, as the decision below is squarely in line with consistent and well-reasoned precedent from the Courts of Appeal.

## REASONS FOR DENYING THE WRIT

### I.

### DISPARITY IN INSURANCE BENEFITS BETWEEN MENTAL AND PHYSICAL DISABILITY DOES NOT VIOLATE THE ADA.

The argument advanced by the petitioner in this litigation is that disparity between mental and physical health benefits violates Titles I and III of the Americans with Disabilities Act (ADA). Respondent submits, and several courts considering this issue agree, that the petitioner's argument is without merit. The Third Circuit correctly held that:

> So long as every employee is offered the same plan regardless of that employee's contemporary or future disability status, then no discrimination has

> occurred even if the plan offers different coverage for the various disabilities.

*Ford*, 145 F.3d at 608.

Petitioner bases her argument on provisions of Titles I and III. Petitioner argues that under Title I, the purpose of the ADA is

> to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . . [by] invok[ing] the sweep of congressional authority.

42 U.S.C. § 12101(b)(1), (4). Petitioner further argues her Title I point by stating that the ADA prohibits discrimination against a qualified disabled individual "because of the disability of such individual." 42 U.S.C. § 12112(a). As for Title III, petitioner bases her argument on the following language:

> It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

42 U.S.C. § 12182(b)(1)(A)(i). However, a fair reading of these statutes compels the conclusion that there is no discrimination as long as the covered entity offers its benefits, contractual and otherwise, to all individuals and classes of individuals on an equal basis, regardless of any disability. In particular, this provision of Title III does not mandate that an entity must

provide certain benefits, but that the benefits and opportunities an entity does provide must be accessible to disabled individuals.

The view that not all disabilities need be treated identically under the ADA is supported by decisions from the Sixth, Seventh, D.C., Eighth, Second, and Third Circuits. In *Parker v. Metropolitan Life Insurance Company*, 121 F.3d 1006, 1019 (6th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 871 (1998), a case identical to this one on the issues and the identity of the defendants, the Sixth Circuit held that there is no discrimination under the ADA if all employees, whether disabled or not, receive the same access to the long-term disability plan. This issue has recently come before the Sixth Circuit again, and that court has held true to its previous ruling. *Lenox v. Healthwise of Kentucky, Ltd.*, 149 F.3d 453, 453 (6th Cir. 1998) (holding that denial of coverage for heart transplant did not violate the ADA, as the "ADA does not prohibit health insurance providers from differentiating between persons with different disabilities.")

In *Equal Employment Opportunity Comm'n v. CNA Ins. Co.*, 96 F.3d 1039 (7th Cir. 1996), the Seventh Circuit held that when all employees, the perfectly healthy and the physically and mentally disabled, receive the same long-term benefits from their employer, there is no ADA violation even if the mental benefits are significantly less than the physical benefits. *Id.* at 1044. The Seventh Circuit refused plaintiff's invitation to broaden the scope of the ADA beyond what Congress intended:

> Without far stronger language in the ADA supporting this result, we are loath to read into it a rule that has been the subject of vigorous, sometimes contentious, national debate for the last several years. Few, if any, mental health advocates have

> thought that the result they would like to see has been there all along in the ADA.

*Id. See also Modderno v. King*, 82 F.3d 1059 (D.C. Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 772 (1997) (holding that the Foreign Service Benefit Plan's disparity in benefits between mental illness and physical illness is permissible); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674 (8th Cir. 1996) (holding that insurance distinctions for infertility which are applied equally to all employees do not discriminate on the basis of disability); *Brennen v. Comptroller of the State of New York*, 100 F.3d 942, 1996 WL 19057 (2d Cir. 1996) (holding benefits extended to one category of disabled persons need not be extended to all other categories); *Doe v. Colautti*, 592 F.2d 704 (3rd Cir. 1979) (holding that a state's medical assistance statute need not treat every disability equally).

This conclusion is also supported by decisions of this Court in the context of the Rehabilitation Act of 1973. In *Alexander v. Choate*, 469 U.S. 287, 302, 105 S. Ct. 712 (1985), this Court held that a limit on in-patient hospital care which did not distinguish between

> those whose coverage will be reduced and those whose coverage will not on the basis of any test, judgment, or trait that the handicapped as a class are less capable of meeting or less likely of having

is not discriminatory under the Rehabilitation Act. Similarly, this Court in *Traynor v. Turnage*, 485 U.S. 535, 549, 108 S. Ct. 1372 (1988), held that it is permissible to extend benefits for one disability and not another:

> There is nothing in the Rehabilitation Act that requires that any benefit extended to one category

> of handicapped persons also be extended to all other categories of handicapped persons.

Decisions concerning the Rehabilitation Act of 1973 have guided courts in their interpretation of the ADA. *Vande Zande v. Wisconsin Dept. of Admin.*, 44 F.3d 538, 542 (7th Cir. 1995).

The position that different levels of coverage for mental and physical disabilities do not violate the ADA also enjoys strong legislative support. In reaching its decision, the Third Circuit in *Ford* examined the Senate Labor and Human Resources Committee report, which states in pertinent part:

> [W]hile it is permissible for an employer to offer insurance policies that limit coverage for certain procedures or treatments, e.g., only a specified amount per year for mental health coverage, a person who has a mental health condition may not be denied coverage for other conditions such as for a broken leg or for heart surgery. . . .

S. Rep. No. 101-116, at 29 (1989), *cited in Ford*, 145 F.3d at 610. In addition, both the *Ford* and *Parker* courts considered Congress' enactment of the Mental Health Parity Act, 42 U.S.C. § 300gg-5, on September 26, 1996, which states that a health insurance plan containing no annual or lifetime limits on medical or surgical benefits affecting physical health may not contain such limits on mental health benefits. Both courts came to the same obvious conclusion:

> Congress' passage of the Mental Health Parity Act suggests Congress believed that the ADA neither governs the content of insurance policies nor requires parity between physical and mental illnesses . . .

*Parker*, 121 F.3d at 1018; *see Ford*, 145 F.3d at 610.

Petitioner in this case has asserted a position which has been soundly rejected by overwhelming authority from this Court and runs contrary to relevant legislative history. Petitioner was never denied any benefit of employment because of her disability; she received the same insurance and long term disability benefits as all the employees of Schering-Plough. Petitioner wishes to stretch the confines of the ADA to fit her claim. In doing so her reading grossly distorts the intent of the ADA.

## II.

## *CARPARTS* IS AN ANOMALY IN ADA JURISPRUDENCE.

Petitioner's reliance upon *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994), is misplaced. Refusing to interpret the lone phrase "insurance office" within its proper context of a laundry list of primarily physical structures, *see* 42 U.S.C. § 12181(7), the First Circuit erroneously held that Title III is not limited to physical structures. *Id.* The First Circuit's reasoning is unsubstantiated and has been discredited by several sound decisions. Two circuit courts have expressly declined to follow *Carparts*, *see Ford*, 145 F.3d at 613-14; *Parker*, 121 F.3d at 1013-14, and its holding concerning Title III places of public accommodation has been rejected in principle by several circuit and district courts. *See Menkowitz v. Pottstown Memorial Med. Ctr.*, No. 97-2041, 1998 U.S. App. LEXIS 20720 (3rd Cir. 1998); *Stoutenborough v. National Football League, Inc.*, 59 F.3d 580, 582-83 (6th Cir. 1995), *cert. denied*, 516 U.S. 1028, 116 S. Ct. 674 (1995) (holding that "[i]t is all of the services which the public accommodation offers, not all service which the lessor of the public accommodation offers which fall within the scope of Title III."); *Sandison v. Michigan High School*

*Athletic Ass'n*, 64 F.3d 1026, 1036 (6th Cir. 1995) (holding that the "critical inquiry will typically be the nature of the *place* to which the disabled individual alleges unequal access."); *Leonard F. v. Israel Discount Bank*, No. 95-6964, 1997 U.S. Dist. LEXIS 9342 (S.D.N.Y. 1997) (holding that Title III does not pertain to employment practices); *Elitt v. U.S.A. Hockey*, 922 F. Supp. 217 (E.D. Mo. 1996) (holding that an organization is not a place of public accommodation); *Pappas v. Bethesda Hosp. Ass'n*, 861 F. Supp. 616 (S.D. Ohio 1994) (holding that Title III is inapplicable to a denial of health insurance benefits to disabled family members).

The existence of the *Carparts* decision is insufficient ground to merit a writ of certiorari. A great many courts have considered the issue and have agreed that Title III governs accessibility to public accommodations. Only the First Circuit has adopted this misplaced view of public accommodation under Title III, a view not supported by a fair reading of the ADA. No other circuit court has given this interpretation any credence.

## III.

## PETITIONER IS NOT A QUALIFIED INDIVIDUAL WITH A DISABILITY AND CANNOT MAINTAIN AN ACTION UNDER TITLE I OF THE AMERICANS WITH DISABILITIES ACT.

The Third Circuit disagreed with that part of the district court opinion below, which held that petitioner could not maintain a Title I action because she is not a "qualified individual with a disability," as required by the statute.

Although we believe that the Title I standing analysis employed by the district court below was correct, the circuit court's contrary view on the issue has no bearing on this

petition. The reason is that both courts agreed on the merits of petitioner's Title I claim, i.e., parity of benefits is not mandated by any title of the ADA. Consequently, the differing approaches of the courts below on that issue provide no basis for granting this petition.

The petitioner does not have standing under Title I of the Americans with Disabilities Act (ADA). Title I prohibits employment discrimination against a "qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). A "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

It is undisputed that Congress intended the ADA to have a comprehensive reach, *Anderson v. Gus Mayer Boston Store*, 924 F. Supp. 763 (E.D. Tex. 1996). All parties agree that Congress intended to end disability-based discrimination in several different contexts, including the employment relationship. However, Congress included the phrase "essential functions" in the definition of a qualified individual with a disability to

> ensure that employers can continue to require that all applicants and employees, including those with disabilities, are able to perform the essential, i.e., the non-marginal functions of the job . . .

H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2 at 55 (1990).

The proper analysis of this issue begins with the proposition that clearly drafted statutes must be applied as written by Congress. *Smith v. United States*, 508 U.S. 223, 113 S. Ct. 2050

(1993). The petitioner has admitted to courts below and to this Court that she is utterly unable to continue in her position at Schering-Plough, with or without any accommodation. Therefore, petitioner is not a qualified individual with a disability and does not meet the primary criteria for standing under the plain language of Title I.

Although the Third Circuit did reach the same ultimate conclusion that petitioner's ADA claims lack merit, we respectfully disagree with that aspect of the Third Circuit's decision below which found petitioner had standing to sue. *Ford v. Schering Plough Corp.*, 145 F.3d 601 (3rd Cir. 1998). The Third Circuit examined provisions in Title VII of the Civil Rights Act of 1964 in conjunction with this Court's decision in *Robinson v. Shell Oil Co.*, 519 U.S. 337, 117 S. Ct. 843 (1997), to remedy the ambiguity the Court perceived in the phrase "qualified individual with a disability". *Ford*, 145 F.3d at 606. However, there is no need to turn to Title VII to interpret the ADA. Congress created a well-designed, well-crafted statute in the ADA. The plain language of the statute, "qualified individual with a disability," answers all perceived ambiguities. An individual must be *qualified* to perform the essential functions of his or her job when one brings suit under the ADA. When petitioner admits she is unable to perform any of her job duties, with or without a reasonable accommodation, this should be the end of the inquiry under the ADA.

Respondent's position on this issue is far from unique. The Seventh Circuit in *Equal Employment Opportunity Commission v. CNA Insurance Company*, 96 F.3d 1039, 1045 (7th Cir. 1996), rejected the Title VII analogy and found the claimant did not have standing because she did not meet the statutory requirement of "qualified individual with a disability". The Court examined the plain language of Title I and questioned "how a person who is no longer able to hold an 'employment

position' fits within this definition." *Id.* at 1043. In *Gonzales v. Garner Food Services, Inc.*, 89 F.3d 1523, 1527-28 (11th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 1822 (1997), the Eleventh Circuit similarly found that the plain language of the ADA and its legislative history indicate that Congress intended to limit Title I protections to persons who could perform the essential functions of the job.

Petitioner's ADA claim is controlled by the plain, unambiguous language of Title I. The most elementary and time-tested rule of statutory construction applies here: "In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous . . . 'that language must ordinarily be regarded as conclusive.' " *Reves v. Ernst & Young*, 507 U.S. 170, 113 S. Ct. 1163, 1169 (1993) (citations omitted); *see also Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 373, 106 S. Ct. 681 (1986) (the "purpose" of a statute is determined first by examining its plain language). Petitioner's construction of Title I is demonstrably at odds with the language and Congressional intent expressed in the statute. Under the plain language, which speaks for itself, petitioner is not a qualified individual with a disability and therefore is not eligible for benefits under Title I.

## IV.

## THE EEOC AND DEPARTMENT OF JUSTICE INTERPRETATIONS OF THE ADA ARE INCORRECT.

The EEOC took the position below that petitioner's claim is encompassed by Title I, and that the definition of "qualified individual" is ambiguous. We have already addressed why this argument lacks merit, but we further note that the EEOC's interpretations of statutes are often incorrect. In *Torres v.*

*National Precision Blanking*, 943 F. Supp. 952 (N.D. Ill. 1996), a case involving claims of sexual harassment under Title VII, the Court was prompted to comment on the soundness of the EEOC's position in litigat on:

> The court is mindful that the EEOC is a frequent litigator in federal courts. . . . Moreover, *the court notes that the EEOC is also a frequent loser in litigation*; not all of its arguments prevail.

*Id.* at 955-56 n.7 (emphasis added).

The Department of Justice argues that the Title III phrase "public accommodation" applies not just to physical access to facilities, but to the content of services provided by a business. This view contradicts the Department's own regulations, which are promulgated pursuant to 42 U.S.C. §§ 12186(b), 12206(a)(1):

> The purpose of the ADA's public accommodation requirements is to ensure accessibility to the goods offered by a public accommodation, not to alter the nature or mix of goods that the public accommodation has typically provided.

28 C.F.R. pt. 36, app. B, at 640 (1997), *cited in Ford*, 145 F.3d at 613. An example given in these regulations is that a bookstore must be accessible to disabled individuals, but need not sell braille or large print books. *Id.* This Court does not owe any deference to the clearly erroneous, and sometimes contradictory, interpretations of the ADA by either the EEOC or the Department of Justice. *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 171, 109 S. Ct. 2854 (1989) (holding that "no deference is due to agency interpretations at odds with the plain language of the statute itself").

## CONCLUSION

This case does not merit further review by this Court. For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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